Supreme Court, U.S.
FILED

No. 091352 MAY 4 - 2010

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

DEAN C. PLASKETT,

*Petitioner,*

v.

UNITED STATES OF AMERICA and
THE GOVERNMENT OF THE VIRGIN ISLANDS,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

GORDON C. RHEA, ESQ.
RICHARDSON PATRICK WESTBROOK
& BRICKMAN, LLC
P. O. Box 1007
Mt. Pleasant, SC 29465
(843) 727-6500
grhea@rpwb.com

*Attorney for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Whether Petitioner was deprived of his Sixth Amendment right to confront witnesses against him when the Government waited until the eve of trial to notify Petitioner that its only witness against him had a severe drug habit during the period at issue in the case but refused to provide Petitioner with the key witness's medical records from two drug rehabilitation centers, thereby limiting Petitioner's ability to cross-examine the key witness.

## PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties: the individual Petitioner, the United States of America, and the Territory of the United States Virgin Islands.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

INDEX TO APPENDIX ..... iii

TABLE OF AUTHORITIES ..... vi

DECISIONS BELOW ..... 1

JURISDICTION ..... 1

STATEMENT OF THE CASE ..... 2

a. Procedural History ..... 2

b. Statement of Facts ..... 4

c. Statement of Lower Court Jurisdiction .... 9

REASONS FOR GRANTING THE WRIT ..... 9

1. This case provides an appropriate opportunity for the Court to resolve the question as to whether impeachment evidence, which has a direct and substantial bearing on the Government's key witness's credibility, is material under *Brady v. Maryland* and its progeny, where the evidence would serve to significantly enhance the quality of impeachment evidence ..... 10

(A) The Third Circuit Erred in Affirming the District Court's Order Because the Improperly Withheld Impeachment Evidence Was Clearly Favorable to Petitioner ..... 13

TABLE OF CONTENTS – Continued

Page

(B) The Third Circuit Erred in Affirming the District Court's Decision Below Because the Government Failed to Fully Disclose All Favorable Impeachment Evidence Regarding its Star Witness ..... 15

(C) The Third Circuit Erred in Affirming the Petitioner's Conviction, As The Evidence Was Material Because it Would Have Substantially Heightened the Quality and Nature of Impeachment Evidence on Cross-Examination ..... 18

(1) Griffin Was of Paramount Importance as a Government Witness..... 21

(2) The Undisclosed Evidence Would Have Significantly Enhanced the Quality of Impeachment..... 22

(3) The Sixth Amendment Confrontation Clause Guaranteed Petitioner the Ability and the Right to Fully Cross-Examine Griffin on the Subject Matter of the Undisclosed Evidence ..... 23

CONCLUSION..... 28

TABLE OF CONTENTS – Continued

Page

INDEX TO THE APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit ..... App. 1

Memorandum Opinion of United States District Court for the Territory of the United States Virgin Islands ..... App. 30

Third Circuit Denial of Petitioner's Petition for Rehearing en banc ..... App. 51

# TABLE OF AUTHORITIES

Page

CASES

*Banks v. Dretke*, 540 U.S. 668 (2004) ..... 11

*Banks v. Thaler*, 583 F.3d 295 (5th Cir. 2009) ..... 22

*Berger v. United States*, 295 U.S. 78 (1935) ..... 10

*Brady v. Maryland*, 373 U.S. 83 (1963) ..... 1

*California v. Green*, 399 U.S. 149 (1970) ..... 24

*Chapman v. California*, 386 U.S. 18 (1967) ..... 25

*Conley v. United States*, 415 F.3d 183 (1st Cir. 2005) ..... 12

*Delaware v. Van Arsdall*, 475 U.S. 673 (1986) ..... 24, 25

*Davis v. Alaska*, 415 U.S. 308 (1974) ..... 24, 25, 27

*Douglas v. Alabama*, 380 U.S. 415 (1965) ..... 23

*Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) ..... 19, 20

*Giglio v. United States*, 405 U.S. 150 (1972) ..... *passim*

*Kentucky v. Stincer*, 482 U.S. 730 (1987) ..... 23

*Kirby v. United States*, 174 U.S. 47 (1899) ..... 25

*Kyles v. Whitley*, 514 U.S. 419 (1995) ..... 18, 19, 21

*Mattox v. United States*, 156 U.S. 237 (1895) ..... 26

*Moore v. Illinois*, 408 U.S. 786 (1972) ..... 11

*Napue v. Illinois*, 360 U.S. 264 (1959) ..... 20, 22

*Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000) ..... 20, 22

*Ohler v. United States*, 529 U.S. 753 (2000) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*Shabazz v. Artuz*, 336 F.3d 154 (2d Cir. 2003).....20

*State v. D'Allessio*, 848 A.2d 1118 (R.I. 2004).....13

*Strickler v. Greene*, 527 U.S. 263 (1999).....11, 16, 17

*United States v. Abel*, 269 U.S. 45 (1984).....24

*United States v. Atherton*, 926 F.2d 728 (2d Cir. 1991).....24

*United States v. Bagley*, 473 U.S. 667 (1985)..... *passim*

*United States v. Casas*, 356 F.3d 104 (1st Cir. 2004).....20

*United States v. Cole*, 457 F.2d 1141 (9th Cir. 1972).....13, 15

*United States v. Fisher*, 106 F.3d 662 (5th Cir. 1997).....22

*United States v. Jadusingh*, 12 F.3d 1162 (1st Cir. 1994).....20

*United States v. Johnson*, 199 F.3d 123 (3d Cir. 1999).....12

*United States v. Manske*, 186 F.3d 770 (7th Cir. 1999).....24

*United States v. Plaskett*, 2009 WL 4643819 (3d Cir. Dec. 2, 2009).....12

*United States v. Recendiz*, 557 F.3d 511 (7th Cir. 2009).....24

*United States v. Risha*, 445 F.3d 298 (3d Cir. 2006).....16

TABLE OF AUTHORITIES – Continued

Page

*United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009) ..... 4, 12

*United States v. Simons*, 964 F.2d 763 (8th Cir. 1992) ..... 26, 27

*United States v. Salem*, 578 F.3d 682 (7th Cir. 2009) ..... 24

*United States v. Trujillo*, 145 F.3d 1347 (1998) ..... 19

TERRITORIAL AND FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V ..... 10

U.S. Const. amend. VI ..... 21, 23, 24

14 V.I.C. § 843(3) ..... 5

FEDERAL STATUTES

18 U.S.C. § 371 ..... 4

18 U.S.C. § 666(a)(1)(B) ..... 1, 2, 4

18 U.S.C. § 981(a)(1)(C) ..... 5

18 U.S.C. § 982(a)(3)(A) ..... 5

18 U.S.C. § 1512(c)(2) ..... 2, 4

18 U.S.C. § 3231 ..... 9

18 U.S.C. § 3742(a) ..... 9

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 1291 ..... 9

28 U.S.C. § 1294(3) ..... 9

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 2461(c) .....5

48 U.S.C. § 1612 .....9

SUPREME COURT & FEDERAL RULES

Supreme Court Rules: 13.1, 13.3, 13.5, 29.2, 30.1 .....2

Fed. R. Evid. 401 .....14

Fed. R. Evid. 608(b) .....24

Fed. R. Crim. P. 16(a)(1)(F) .....7

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Dean C. Plaskett ("Petitioner") respectfully petitions this Court for a Writ of Certiorari to review the judgment and the opinion of the United States Court of Appeals for the Third Circuit, finding no violation of *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny and affirming an Order of the District Court for the United States Virgin Islands that convicted Petitioner of bribery under 18 U.S.C. § 666(a)(1)(B).

## DECISIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix (App.) at App. 1. The denial of Petitioner's Petition for Rehearing en banc is reprinted at App. 51. The decision of the United States District Court for the Territory of the United States Virgin Islands is reprinted at App. 30.

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the order of the United States District Court for the Virgin Islands was filed and entered on December 9, 2009. App. 1. A petition for rehearing en banc was denied on February 3, 2010. App. 51. The present petition is

being filed by postmark on or before May 4, 2010. Rules 13.1, 13.3, 13.5, 29.2, 30.1. This Court properly has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

### a. Procedural History

On November 8, 2007, a grand jury returned a twelve-count indictment against Petitioner and two co-defendants, alleging that they participated in a scheme involving the issuance of government contracts in exchange for financial kickbacks. On February 27, 2008, following a two-week jury trial, Petitioner was convicted on three counts of the indictment: Count Three, bribery, in violation of 18 U.S.C. § 666(a)(1)(B), and Counts Nine and Ten, obstruction of justice, in violation of 18 U.S.C. § 1512(c)(2). Petitioner was acquitted of the remaining charges. Thereafter, on August 14, 2008, the trial judge sentenced Petitioner to 108 months in prison and entered a personal money judgment against Petitioner in the amount of $1,086,237.34. Judgments were entered on December 9, 2008. The Petitioner subsequently filed a timely notice of appeal of his conviction, effective on December 9, 2008, to the United States Court of Appeals for the Third Circuit. There, Petitioner raised two issues on appeal:

1. Whether the District Court erred in refusing to find the Government violated

the mandates of *Brady v. Maryland* when the Government waited until the eve of the trial to notify Petitioner that the Government's key witness had a severe drug problem during the times at issue in the case, and refused to provide Petitioner with the key witness's medical records from two separate rehabilitation centers, thereby preventing Petitioner's counsel from fully cross examining said key witness.

2. Whether the District Court erred in excluding recorded telephone conversations demonstrating that Petitioner was ignorant of the bribery and kickback scheme; and

3. Whether the aforementioned errors were so prejudicial to Petitioner as to amount to a denial of Petitioner's constitutional right to confront witnesses.

On December 9, 2009, the Third Circuit entered its Opinion, finding no violation of *Brady v. Maryland* and its progeny and affirming the District Court's Order. In response, Petitioner filed a motion for reconsideration in the United States Court of Appeals for the Third Circuit, pursuant to Rule 27, Federal Rules of Appellate Procedure and the Local Appellate Rules of the United States Court of Appeals for the Third Circuit. On January 11, 2010, Petitioner filed a motion for permission to file exhibits for a Petition for Panel Hearing en banc, and on January 12, 2010, Petitioner filed his Petitioner for Panel Hearing en

banc, alleging: (1) that the panel decision was contrary to the holdings of *Brady*, *United States v. Giglio*, 405 U.S. 150 (1972) and their progeny and conflicted with the Tenth Circuit's recent decision in *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009); and (2) that rehearing was warranted in order to allow the Third Circuit to consider the transcript of recorded conversations between Petitioner and the Government's star witness. On February 3, 2010, Petitioner's motion for rehearing en banc was denied. On or before May 4, 2010, Petitioner filed this Petition for Certiorari with this Honorable Court.

**b. Statement of Facts**

Petitioner was the Commissioner of the Virgin Islands Department of Planning and Natural Resources ("DPNR") from 1999 until 2006. On November 8, 2007, a grand jury returned a twelve-count indictment against Petitioner and two co-defendants, alleging that they participated in a scheme involving the issuance of government contracts in exchange for financial kickbacks. Count One charged Petitioner with conspiracy to commit theft or bribery concerning programs receiving federal funds and honest services mail fraud, in violation of 18 U.S.C. § 371. Counts Two through Four charged Petitioner with theft or bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666(a)(1)(B). Count Eight charged Petitioner with conspiracy to obstruct justice, in violation of 18 U.S.C. § 371. Counts Nine and Ten charged Petitioner with obstruction of justice, in violation of 18 U.S.C. §§ 1512(c)(2) and 2. Counts Eleven

and Twelve charged Petitioner with making false statements and fraudulent claims, respectively, to local investigators, in violation of 14 V.I.C. § 843(3). Additionally, forfeiture allegations were included in the indictment pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(3)(A), and 28 U.S.C. § 2461(c).

The Government's key witness at trial was Hollis Griffin. From May 1999 until July 2004, Griffin served as Director of the Division of Environmental Protection, one of DPNR's component divisions. As Commissioner of the DPNR, Petitioner was Griffin's direct supervisor. Griffin provided the sole testimony regarding the alleged payments of bribes that were at the heart of the entire trial. In fact, Griffin himself recognized his importance on this issue that was a requisite element of the Government's case. When asked, "So if we are to want to know what money Mr. Plaskett got or whether Mr. Plaskett ever got any money, you're the only one who can tell us, is that right sir?", Griffin responded, "That's what I testified to." Trial Transcript, 2/13/08, at 14. No other witness provided testimony regarding the payment of bribes to Petitioner. Moreover, Griffin provided the sole testimony regarding the alleged initial meeting with Petitioner and co-defendant Biggs wherein Petitioner was allegedly drawn into the bribery and kickback scheme. Trial Transcript, 2/13/08, at 10-12. Simply stated, Griffin was the mastermind behind the bribery and kickback scheme and the only witness who implicated Petitioner in the scheme. Trial Transcript, 2/12/08, at 165-68.

On multiple occasions, the Government recognized Griffon's importance to its case. The Government represented that "Mr. Griffin is essential – his testimony, as you've seen here in this trial, is essential to establishing the criminal conduct of these defendants." Trial Transcript, 2/14/08, at 307. Indeed, the Government later referred to Griffin as "not just a witness, but really the essential witness to this case, without whom the government may not have a case." Trial Transcript, 2/14/08, at 315.

The Government also knew that Griffin was an admitted drug addict and had undergone rehabilitative treatment on at least two separate occasions. Despite the indisputable importance of this impeachment evidence, the Government withheld this information from Petitioner for most of the pre-trial stages. It only divulged this evidence to Petitioner seven days before trial, and even then failed to provide any documentary evidence more fully describing the addiction from which the Government's star witness suffered. Specifically, the Government provided no medical records regarding Griffin's two (known) independent treatments for his drug addictions. Instead, it stated that such records were not in the Government's possession and it could therefore not provide them to the defense.

On November 11, 2007, Petitioner served the Government his First Request for Production of Discovery. Item 24 requested:

> The identity of each prospective witness who had been hospitalized or treated for emotional disorders, alcoholism, or drug abuse, including the name of each institution involved, the date of each hospitalization, and a copy of each report that relates to the treatment of such condition.

District Court Docket Number 23. On February 4, 2008, counsel for Petitioner received the Government's letter pursuant to its obligations stemming from Rule 16(a)(1)(F), Federal Rules of Criminal Procedure, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972) (hereinafter "*Brady* letter"). The *Brady* letter essentially stated that Griffin had used marijuana, cocaine, and/or crack cocaine, and had twice received rehabilitative medical treatment for substance abuse. District Court Docket Number 233-3. The *Brady* letter was not accompanied by any documents or other evidentiary support for these assertions. The Government, despite Petitioner's telephonic and written requests, did not disclose the details of either of Griffin's treatments, including why Griffin decided to enter treatment, the nature and extent of Griffin's drug dependence, who paid for the treatments, the names of the facilities and the names of his treating physicians.

Petitioner did, through his own efforts, learn of Griffin's initial rehabilitation treatment. As this treatment occurred during Griffin's tenure at DPNR, Petitioner recalled that Griffin was treated by Dr.

Jeffrey Winston at a facility in Atlanta. By letter dated January 15, 2008, counsel for Petitioner sought the Government's assistance in obtaining the medical records of Griffin's treatment by Dr. Winston. Third Circuit App. at DP00026. The Government refused such assistance and by telephone conversation explained that the Government itself did not possess these records. On January 15, 2008, Petitioner filed a Motion for Entry of an Order to Issue Subpoenas Duces Tecum and Require Pretrial Production of Documents Pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, thereby seeking the Court's assistance in securing the rehabilitation records of Dr. Winston. District Court Docket Number 51. The Court declined to issue the requested Order.

Significantly, the *Brady* letter provided Petitioner with his first knowledge of Griffin's second and longer treatment at a rehabilitation facility. However, that letter provided absolutely no details regarding his second rehabilitation treatment apart from the declaration that he "successfully completed the approximately six-month program." Furthermore, the District Court significantly limited the scope of cross-examination for Defense Counsel. Importantly, at one point, the trial judge stated: "I'm not going to have a trial within a trial." Trial Transcript, 2/13/08, at 149.

On February 27, 2008, the jury returned a verdict of guilty against Petitioner on Counts Three, Nine, and Ten. Petitioner was acquitted of the other offenses charged against him. On August 14, 2008,

Petitioner was sentenced to incarceration for 108 months.

**c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii).**

The District Court of the Virgin Islands had jurisdiction over this criminal matter pursuant to 18 U.S.C. § 3231 and 48 U.S.C. § 1612, as the indictment alleged offenses against both the laws of the United States and the territory of the Virgin Islands. Following Petitioner's and co-defendant's timely notice of appeal, the Third Circuit Court of Appeals for the United States had proper jurisdiction under 28 U.S.C. §§ 1291 and 1294(3) and 18 U.S.C. § 3742(a).

## REASONS FOR GRANTING THE WRIT

The opinion of the court below irreconcilably conflicts with law regarding the right to impeach witnesses under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and this Honorable Court should therefore grant this Petition for a Writ of Certiorari.

**1. This case provides an appropriate opportunity for the Court to resolve the question as to whether impeachment evidence, which has a direct and substantial bearing on the Government's key witness's credibility, is material under *Brady v. Maryland* and its progeny, where the evidence would serve to significantly enhance the quality of impeachment evidence.**

The Due Process Clause of the Fifth Amendment of the United States Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In *Brady v. Maryland*, this Court held that due process requires prosecutors to disclose any and all evidence that is favorable to the accused and is material either to guilt or punishment. 373 U.S. 83, 88 (1963). *See also Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that *Brady* requires the disclosure of impeachment evidence going to government witnesses). Since "the prosecutor's role transcends that of an adversary," *Berger v. United States*, 295 U.S. 78, 88 (1935), a prosecutor's failure to comply with the mandates of *Brady* and its progeny, can result in an unconstitutional deprivation of the defendant's right to due process. *See United States v. Bagley*, 473 U.S. 667 (1985) ("[The *Brady* rule] is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."). The failure to make a proper *Brady* disclosure violates constitutional due process where: [1] "[t]he evidence

at issue [was] favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence [was] suppressed by the State, either willfully or inadvertently; and [3] prejudice . . . ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Strickler*, 527 U.S. at 281-82 (1999)). *See Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). Under the third prong, whether prejudice ensued is guided by whether the improperly withheld evidence was material:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. . . . A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

*United States v. Bagley*, 473 U.S. 667, 682 (1985).

In the present case, the Third Circuit Court of Appeals held:

> Assuming *arguendo* that the details of Griffin's drug use and subsequent treatment were favorable to Plaskett . . . as impeachment evidence and that such evidence was suppressed, there was no *Brady* violation as the evidence was not material. Plaskett and Biggs concede that they had some knowledge of Griffin's drug use and rehabilitation treatment, and they used this evidence to cross-examine Griffin and to discredit him as a witness during their opening and closing statements. The more detailed information sought by Plaskett and Biggs "would not

> have put the whole case in such a different light as to undermine confidence in the verdict, and would have been merely cumulative." *United States v. Johnson*, 199 F.3d 123, 128 (3d Cir. 1999); *accord Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005) ("Suppressed impeachment evidence is immaterial under *Brady* . . . if the evidence is cumulative or impeaches on a collateral issue. Suppressed impeachment evidence, if cumulative of *similar* impeachment evidence used at trial . . . is superfluous and therefore has little, if any, probative value." (internal citations omitted)). The fact that the evidence of Griffin's drug abuse was cumulative of evidence already possessed by Plaskett and Briggs distinguishes the instant case from *United States v. Robinson*, 583 F.3d 1265, 2009 WL 3358158 (10th Cir. Oct. 20, 2009), on which Plaskett and Biggs rely. In *Robinson*, the court explicitly held that the suppressed evidence "was not cumulative. . . . None of the [] avenues of impeachment [based on the suppressed evidence] is duplicative of those Robinson was able and allowed to pursue at trial." *Id.* at *7 (citation omitted). In contrast, Plaskett and Biggs could and did attempt to impeach Griffin on his drug use, rendering the allegedly suppressed evidence duplicative. The District Court correctly concluded that the government did not violate *Brady* or *Giglio*.

*United States v. Plaskett*, 2009 WL 4643819, *2 (3d Cir. Dec. 2, 2009).

The Third Circuit, however, erred because the evidence was indeed material. Specifically, the medical records, if properly disclosed, would have permitted the Defense to more properly and thoroughly question Griffin before the jury on cross-examination, thereby significantly enhancing the quality and nature of impeachment of the Government's key witness's credibility. Thus, "if disclosed and used effectively . . . it may [have made] the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. As the Third Circuit did not address all prongs of the *Brady* analysis, but rather solely delved into the third prong, this Petition will initially address the first two prongs. Thereafter, it will show how the evidence was, indeed, material under the third component of the *Brady* analysis.

### (A) The Third Circuit Erred in Affirming the District Court's Order Because the Improperly Withheld Impeachment Evidence Was Clearly Favorable to Petitioner.

Under *Brady*, evidence that is favorable includes both impeachment and exculpatory evidence. *Bagley*, 473 U.S. at 676. Specific information regarding drug use and treatment is proper to raise on cross-examination because it assists the trier-of-fact in gauging the witness's credibility, *see generally State v. D'Allessio*, 848 A.2d 1118 (R.I. 2004), and illustrates a witness's mental facultative impairment as well as bias. *See generally United States v. Cole*, 457 F.2d

1141 (9th Cir. 1972); *see also* Fed. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

In the present case, Griffin was the key government witness whose credibility and believability "ma[de] the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. As such, the withheld medical records and testimonial evidence elicited on cross-examination would have significantly impacted his credibility in terms of: (1) his motives for testifying; (2) his general mental and perceptive faculties; and (3) his believability as a witness.

The evidence would have served to fully enlighten the jury as to the motivations of Griffin's actions, including his motives to take bribes and to lie about Petitioner's alleged acceptance of bribes. At one point, Griffin used cocaine multiple times per week, and his drug use peaked during the purported kickback scheme. Trial Transcript, 2/12/08, at 347-48. Indeed, a logical conclusion would be that Griffin lied about the bribery scheme and kept the bribe money for himself, as it is common knowledge that drug addicts lie and steal in order to sustain and further their drug dependency. Although Petitioner's Counsel superficially touched upon this subject during cross-examination, the District Court prohibited further questioning. Trial Transcript, 2/12/08, at 333-45. Thus, Petitioner was forced to accept Griffin's

answers on their face without the benefit of any impeachment materials.

Second, since Griffin's drug use peaked at the height of the purported bribery scheme, the medical records were relevant to his capacity to perceive and to recall because drug use can impact one's perception and ability to recall. *See generally United States v. Cole*, 457 F.2d 1141 (9th Cir. 1972). In addition, untimely disclosure of Griffin's drug problems and the unavailability of his drug-rehabilitation records prevented Petitioner from securing expert testimony to further assail the trustworthiness of Griffin's testimony. Moreover, the District Court even prevented defense counsel from pursuing a line of questioning into whether Griffin was under the influence while he was testifying.

**(B) The Third Circuit Erred in Affirming the District Court's Decision Below Because the Government Failed to Fully Disclose All Favorable Impeachment Evidence Regarding its Star Witness.**

A prosecutor must disclose "evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675. As the *Brady* rule is based upon due process considerations and aims to "ensure that a miscarriage of justice does not occur," *Bagley*, 473 U.S. at 675, the duty to disclose is intricately connected with the

unique role of the prosecutor in resolving criminal matters:

> By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in criminal prosecution is not that it shall win a case, but that justice shall be done."

*Id.* at 675 n. 7 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Moreover, the prosecutor's duty is not preconditioned on defendant's request, as the individual "has a duty to learn of any favorable evidence known to others acting on the government's behalf." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Furthermore, the prosecution "has an obligation to produce evidence that is *constructively* in its possession. Constructive possession means that although a prosecutor has no actual knowledge, he should have known that the material at issue was in existence." *United States v. Risha*, 445 F.3d 298, 307 (3d Cir. 2006) (Nygaard, J., dissenting).

In this case, the second component of *Brady* is satisfied because the Government knew of the existence of the impeachment evidence and made only partial disclosure through the *Brady* letter. Importantly, Griffin's status as a cooperating witness uniquely positioned the Government well in advance

of trial to learn about, fully investigate, and acquire impeachment evidence in the form of Griffin's rehabilitative records. The Plea Agreement itself provided in pertinent part:

> Defendant HOLLIS L. GRIFFIN agrees that he will cooperate fully, completely, and truthfully with all investigators and attorneys of the United States, by truthfully providing all information in his possession relating directly or indirectly to all criminal activity and related matters which concern the subject matter of this investigation and of which he has knowledge, or relating to other matters deemed relevant to the United States. This includes, but is not limited to: . . . disclosing the existence of and producing to the Government any and all books, papers, documents, and other items of evidentiary value that are in his actual or constructive possession. . . .

Third Circuit App. at DP00129. Since the Government had the opportunity to acquire records of Griffin's drug use and treatment pursuant to the Plea Agreement, it was in constructive possession of the same. Under *Brady* and its progeny, therefore, the Prosecution was obligated to acquire such information and disclose it in advance of trial. *See, e.g.*, *Strickler v. Greene*, 527 U.S. at 280; *Berger*, 295 U.S. at 88. Nevertheless, the *Brady* letter, which the Government waited until the eve of trial to give to the Petitioner, only superficially indicated past drug use and stays in rehabilitative facilities. Thus, while the

Government provided the Petitioner with partial evidence of these problems, it turned over no evidence delineating the severity of the problem, no evidence regarding whether Griffin committed any drug infractions since he began cooperating with the Government, and no evidence regarding the facilities or doctors who worked with Griffin. These substantive deficiencies, viewed as a whole, show that the Government abrogated its duty under *Brady* and suppressed the evidence that was favorable to the Petitioner.

**(C) The Third Circuit Erred in Affirming the Petitioner's Conviction, As The Evidence Was Material Because it Would Have Substantially Heightened the Quality and Nature of Impeachment Evidence on Cross-Examination.**

Prejudice exists "when the suppressed evidence is material for *Brady* purposes." *Banks v. Dretke*, 540 U.S. 668, 691 (2004). Favorable evidence "is material . . . 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *Bagley*, 473 U.S. at 682). As the Supreme Court has explained:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair

> trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines the confidence in the outcome of trial."

*Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). Importantly, "[t]he materiality of suppressed evidence is 'considered collectively, not item by item.'" *Jackson*, 513 F.3d at 1078, 1071 (quoting *Kyles*, 514 U.S. at 436). Once a *Brady* error is established under the *Kyles* materiality test, "there is no need for further harmless-error review." *Kyles*, 514 U.S. at 435. "This is because a reasonable probability of a different result in the proceeding necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict." *Douglas v. Workman*, 560 F.3d 1156, 1173-74 (10th Cir. 2009) (quoting *Kyles*, 514 U.S. at 435) (internal citations omitted).

Whether undisclosed impeachment evidence is material under *Brady* and its progeny depends upon both the importance of the witness's testimony to the Government's case and the degree to which the undisclosed evidence would impact the quality of impeachment of that witness. Indeed, undisclosed impeachment evidence that is duplicative of pre-existing impeachment evidence is immaterial where it "would have provided only marginal support for [the] defense." *United States v. Trujillo*, 145 F.3d 1347, 1394 (1998). Thus, where a witness's credibility

has been sufficiently attacked on other grounds, evidence further attacking the witness's credibility is merely duplicative. *See, e.g.*, *United States v. Casas*, 356 F.3d 104 (1st Cir. 2004) (holding no prejudice where government suppressed drug test failure of key witness because the witness admitted to it on cross-examination); *United States v. Jadusingh*, 12 F.3d 1162, 1166 (1st Cir. 1994) (same); *see also Shabazz v. Artuz*, 336 F.3d 154 (2d Cir. 2003) (no *Brady* violation where the government failed to disclose the drug habits of two key witnesses because the Petitioner sufficiently attacked their credibility at trial and the two key witnesses admitted to having serious drug habits while testifying).

The materiality of impeachment evidence is heightened, however, where it relates directly to the credibility of a key Government witness whose testimony serves as the essential basis for conviction. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."); *Nuckols v. Gibson*, 233 F.3d 1261, 1266 (10th Cir. 2000) (finding that undisclosed impeachment evidence was material because if the sole witness's testimony "were impeached, the entire support for the State's case would have been significantly undermined, if not destroyed altogether."); *Douglas*, 560 F.3d at 1175 ("Because impeachment of the witness who held the

key to the successful prosecution of [the defendant] was denied to the defense, the district court correctly concluded that the State's *Brady* violations were material."). Thus, "evidence insignificantly impacting the degree of impeachment may not be sufficient to meet the *Kyles* materiality standard, while evidence significantly enhancing the quality of impeachment evidence usually will." *Id.* at 1174.

In the present case, the Third Circuit Court of Appeals committed prejudicial error by finding the evidence was not material because: (1) Griffin was the key Government witness whose testimony served as the sole basis for conviction; (2) the undisclosed evidence would have significantly enhanced the quality of impeachment of Griffin; and (3) the Sixth Amendment Confrontation Clause guaranteed Petitioner the ability and the right to fully cross-examine Griffin on the subject matter of the undisclosed evidence.

### (1) Griffin Was of Paramount Importance as a Government Witness.

As earlier mentioned, Griffin was indispensible to the Government's case. Indeed, on multiple occasions, the Government itself recognized this fact, conceding that Griffin was "not just a witness, but really the essential witness to this case, without whom the government may not have a case." Trial Transcript, 2/14/08 at 315. If his testimony "were impeached[, therefore], the entire support for the

[Government's] case would have been significantly undermined, if not destroyed altogether." 233 F.3d at 1266.

**(2) The Undisclosed Evidence Would Have Significantly Enhanced the Quality of Impeachment.**

Furthermore, the undisclosed evidence was not merely cumulative; it would have significantly enhanced the quality of the Defense's impeachment of Griffin. As earlier mentioned, the Supreme Court has recognized that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269. This is especially true where "the prosecution's case is solely dependent upon a key witness," *Banks v. Thaler*, 583 F.3d 295, 330 (5th Cir. 2009). In *United States v. Fisher*, 106 F.3d 662 (5th Cir. 1997) the Fifth Circuit Court of Appeals held that suppressed impeachment evidence "tending to discredit" the government key witness was material. *Id.* at 634-35, *abrogated on other grounds by*, *Ohler v. United States*, 529 U.S. 753, 755 (2000).

In the present case, the undisclosed evidence would not have been duplicative of other evidence attacking Griffin's credibility. At trial, Griffin merely stated he had drug problems in the past. However,

details of his extensive history of drug use and treatment was of crucial importance to the defense's ability to test and undermine Griffin's credibility. The fact the Government's case rested squarely on Griffin's testimony heightened the need of thorough cross-examination of this subject. The evidence was clearly material, as "the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict."

**(3) The Sixth Amendment Confrontation Clause guaranteed Petitioner the ability and the right to fully cross-examine Griffin on the subject matter of the undisclosed evidence.**

Since the evidence was indeed material, the Government's partial *Brady* disclosure and the District Court's substantial limitation on Petitioner's scope of cross-examination of Griffin violated Petitioner's rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. "[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Kentucky v.*

*Stincer*, 482 U.S. 730, 736 (1987) (quoting *Davis v. Alaska*, 415 U.S. 308, 316 (1974)). While the Confrontation Clause mainly serves to secure the right of cross-examination, through it "the judge and jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying." *California v. Green*, 399 U.S. 149, 153 (1970).

In the present case, the withheld evidence was admissible to show Griffin's bias and for "other purposes," including Griffin's credibility as a witness. Indeed, Rule 608(b), *Federal Rules of Evidence*, does not preclude the admissibility of the evidence. *See United States v. Atherton*, 936 F.2d 728, 733 (2d Cir. 1991) ("It is true that when evidence of a witness' prior misconduct is properly offered to show bias, that evidence is not limited by the strictures of Rule 608(b).") (internal citations and quotation marks omitted); *United States v. Manske*, 186 F.3d 770, 777 (7th Cir. 1999) ("[Proof of bias] is the quintessentially appropriate topic for cross-examination.") (internal quotation omitted); *United States v. Abel*, 469 U.S. 45 (1984) (discussing how proof of bias differs from evidence prohibited by Rule 608(b)); *United States v. Salem*, 578 F.3d 682, 686 (7th Cir. 2009) ("Indeed, exposing a witness's motive to lie is a 'core value' of the Sixth Amendment's Confrontation Clause.") (quoting *United States v. Recendiz*, 557 F.3d 511, 530 (7th Cir. 2009)).

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Supreme Court held that "a criminal defendant states a violation of the confrontation clause by

showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Id.* at 679 (quoting *Davis*, 415 U.S. at 318). In *Van Arsdall*, the Court stated that the burden of showing a Confrontation Clause violation was met where "[a] reasonable jury might have received a significantly different impression of [witness'] credibility had respondent's counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680. However, the *Van Arsdall* court held that the "constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to the [*Chapman v. California*, 386 U.S. 18 (1967)] harmless-error analysis." *Id.* at 684. Thus, courts must ask, assuming "the damaging potential of the cross-examination were fully realized," whether the error was harmless beyond a reasonable doubt. This inquiry depends on several factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* In *Kirby v. United States*, 174 U.S. 47 (1899), the Supreme Court described the Confrontation Clause's operation as

follows: "[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." *Id.* at 55.

As the Supreme Court explained in *Mattox v. United States*, 156 U.S. 237, 242-43 (1895):

> The primary object of the constitution provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, *not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*

*United States v. Simmons*, 964 F.2d 763 (8th Cir. 1992) is particularly instructive. There, the Government's cooperating witness failed a drug test right before trial, and the prosecution was neither aware of the test nor the failure, and the evidence was not disclosed to defense counsel. The court wrote:

> Without the evidence that [the witness] recently failed a drug test given by the probation officer, however, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness." *Davis*, 415 U.S. at 318. Although we do not speculate as to whether the jury would have found the prohibited line of inquiry persuasive, "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of facts and credibility, could appropriately draw inferences relating to the reliability of a witness." *Id.* Appellants have thus met the burden of showing a violation of the confrontation clause.

*Id.* at 770.

In this present case, Griffin was the key government witness – without the jury believing him, the government could not have proven the defendant guilty beyond a reasonable doubt on any charge. There was no other significant evidence against defendant but this testimony. The fact that the prosecution failed to timely disclose impeachment evidence, and that the court furthered the error by prohibiting cross-examination into the subject, precluded a substantial attack on the witness' credibility and his ability to recall the facts to which he testified, as well as his bias in favor of the government.

## CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

GORDON C. RHEA
*Attorney for Petitioner*

May 4, 2010.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 08-3531

---

UNITED STATES OF AMERICA

v.

DEAN C. PLASKETT,

Appellant

---

No. 08-3532

---

UNITED STATES OF AMERICA

v.

MARC A. BIGGS,

Appellant.

---

On Appeal from the United States District Court
for the District of the Virgin Islands
(D.C. No. 2007-cr-60)
District Judge: Honorable Curtis V. Gomez

---

Submitted Under Third Circuit L.A.R. 34.1(a),
December 2, 2009

Before: McKEE, FUENTES,
and NYGAARD, Circuit Judges.

(Opinion Filed: December 9, 2009)

---

OPINION OF THE COURT

---

FUENTES, *Circuit Judge*:

Appellants, Dean C. Plaskett and Marc. A Biggs, appeal from the District Court's ruling denying their post-trial motions as well as the underlying and preceding orders and rulings by the District Court addressing the issues raised in the post-trial motions. Biggs also challenges aspects of the jury charge and the sentence imposed by the District Court. For the reasons that follow, we will affirm the rulings of the District Court and appellants' convictions and sentences.[1]

## I.

Because we write primarily for the parties, we only discuss the facts and proceedings to the extent necessary for the resolution of the case.

---

[1] The District Court exercised jurisdiction pursuant to 18 U.S.C. § 3231 as Plaskett and Biggs were charged with offenses against the United States. *United States v. Cartwright*, 359 F.3d 281, 285 (3d Cir. 2004). As the District Court's judgments of conviction and sentence were final decisions, we have jurisdiction over the appeals pursuant to 28 U.S.C. § 1291. *Id.*

Plaskett and Biggs, were, respectively, the Commissioner of the Virgin Islands Department of Planning and Natural Resources and the Commissioner of Property and Procurement. They were charged with participating in an elaborate bribery and kickback scheme with other government officials and complicit business owners. The Indictment alleged that the members of the scheme used fictitious and real companies to obtain government contracts worth more than $1.4 million and progress payments of more than $1 million, despite little or no contract performance.

At trial, the key government witness was Hollis Griffin, the former Director of the Division of Environmental Protection. Griffin, a cooperating witness and alleged coconspirator, provided the critical testimony regarding the alleged payment of bribes at the heart of the case. Following trial, Plaskett and Biggs were each convicted of one count of federal program bribery; Plaskett was also convicted of two counts of obstruction of justice. They were acquitted of the remaining charges against them. The District Court sentenced Plaskett and Biggs to 108 months and 84 months in prison, respectively. In addition, the District Court imposed personal money judgments against them – $1,086,237 against Plaskett and $960,482 against Biggs.

On appeal, Plaskett and Biggs raise a number of challenges to their convictions and sentences. We review each challenge in turn.

## II.

Plaskett challenges the District Court's exclusion of tapes of recorded phone calls between himself and Griffin. The Court ruled that while portions of the tapes could be used to rebut Griffin's direct testimony, overall, the tapes were hearsay and inadmissible on direct examination of Plaskett. The Court also concluded that the evidence was more prejudicial than probative. Plaskett argues that the District Court's rulings were erroneous, but he has not provided either reproductions of the recorded conversations or written transcripts for the panel to review. Without the capability to examine the evidence at issue, the panel cannot rule on the merits of Plaskett's arguments regarding the tapes and deems such arguments waived.

A week before trial, the government sent defense counsel a letter pursuant to Federal Rule of Criminal Procedure 16(a) that disclosed that Griffin had used illegal drugs and had sought drug rehabilitation treatment on two separate occasions; the government did not provide details of or medical records from either treatment. Plaskett and Biggs argue that the timing of this disclosure and the failure to provide more details violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). When a motion for a new trial is based on a *Brady* claim, we "conduct a de novo review of the district court's conclusions of law as well as a clearly erroneous review of any findings of fact." *United*

*States v. Pelullo*, 399 F.3d 197, 202 (3d Cir. 2005) (internal quotation marks & citations omitted).

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . . ." 373 U.S. at 87. The Supreme Court has further elaborated that suppressed "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Assuming *arguendo* that the details of Griffin's drug use and subsequent treatment were favorable to Plaskett and Biggs as impeachment evidence and that such evidence was suppressed, there was no *Brady* violation as the evidence was not material. Plaskett and Biggs concede that they had some knowledge of Griffin's drug use and rehabilitation treatment, and they used this evidence to cross-examine Griffin and to discredit him as a witness during their opening and closing statements. The more detailed information sought by Plaskett and Biggs "would not have put the whole case in such a different light as to undermine confidence in the verdict, and would have been merely cumulative." *United States v. Johnson*, 199 F.3d 123, 128 (3d Cir. 1999); *accord Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005) ("Suppressed impeachment

evidence is immaterial under *Brady* . . . if the evidence is cumulative or impeaches on a collateral issue. Suppressed impeachment evidence, if cumulative of *similar* impeachment evidence used at trial . . . is superfluous and therefore has little, if any, probative value." (internal citations omitted)). The fact that the evidence of Griffin's drug abuse was cumulative of evidence already possessed by Plaskett and Biggs distinguishes the instant case from *United States v. Robinson,* ___ F.3d ___, 2009 WL 3358158 (10th Cir. Oct. 20, 2009), on which Plaskett and Biggs rely. In *Robinson,* the court explicitly held that the suppressed evidence "was not cumulative. . . . None of the [] avenues of impeachment [based on the suppressed evidence] is duplicative of those Robinson was able and allowed to pursue at trial." *Id.* at *7 (citation omitted). In contrast, Plaskett and Biggs could and did attempt to impeach Griffin based on his drug use, rendering the allegedly suppressed evidence duplicative. The District Court correctly concluded that the government did not violate *Brady* or *Giglio.*

After trial, Biggs moved for acquittal on the ground that the evidence was insufficient to support his conviction for federal program bribery, specifically that the evidence did not establish that he acted with corrupt intent or that he received a cash payment in connection with a contract in or about mid-January 2003. The District Court denied the motion. Biggs "must overcome a 'very heavy burden' to overturn the jury's verdict for insufficiency of the evidence." *United*

*States v. Cuevas-Reyes*, 572 F.3d 119, 121 (3d Cir. 2009) (quoting *United States v. Dent*, 149 F.3d 180, 187 (3d Cir. 1998)). We sustain a defendant's conviction if, viewing the evidence in the light most favorable to the government, "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . . .'" *United States v. Voigt*, 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Based on the record, a reasonable jury could have found that the government proved Biggs's corrupt intent and receipt of a cash payment in or about mid-January 2003. For the reasons stated by the District Court, we will affirm the denial of Biggs's motion for judgment of acquittal.

Biggs raises two challenges to the jury charge. "We exercise plenary review in determining 'whether the jury instructions stated the proper legal standard. We review the refusal to give a particular instruction or the wording of instructions for abuse of discretion.'" *United States v. Leahy*, 445 F.3d 634, 642 (3d Cir. 2006) (quoting *United States v. Coyle*, 63 F.3d 1239, 1245 (3d Cir. 1995)). In our review, "we consider the totality of the instructions and not a particular sentence or paragraph in isolation." *Id.* (internal quotation marks & citation omitted).

First, Biggs argues that the District Court erred in denying his request to instruct the jury on good faith; this argument is without merit. We have held that "a district court does not abuse its discretion in denying a good faith instruction where the

instructions given already contain a specific statement of the government's burden to prove the elements of a 'knowledge' crime." *Leahy,* 445 F.3d at 651 (citation omitted). In the instant case, the District Court's charge clearly defined the elements of the crimes with which Biggs was charged, including the intent element. In light of these instructions, a good faith charge was "unnecessary and redundant. If the jury found that [Biggs] had acted in good faith, it necessarily could not have found that [he] had acted with the requisite scienter." *Id.* Thus, the District Court did not err in failing to charge the jury on good faith.

Second, Biggs contends that the District Court incorrectly instructed the jury on federal program bribery, failing to properly explain the requisite *mens rea*. As Biggs did not object to the charge at trial, we review for plain error. *United States v. Williams,* 464 F.3d 443, 445 (3d Cir. 2006). Biggs was charged with three counts of federal program bribery, in violation of 18 U.S.C. § 666(a)(1)(B). The jury instructions delivered by the District Court were consistent – virtually identical – with the Third Circuit model jury instructions for Solicitation of a Bribe by an Agent of a Program Receiving Federal Funds (18 U.S.C. § 666(a)(1)(B)). The District Court also elaborated on the *mens rea* required for a violation of the statute, clarifying what it means to act "corruptly," as follows:

> A public official demands, seeks, or receives a thing of value corruptly if the official accepts the item knowingly and

intentionally, with the purpose either of accomplishing an unlawful end or lawful result, or of accomplishing some otherwise lawful end or lawful result influenced by the receipt of the thing of value.

Corrupt acts are normally motivated by hope or expectation of either financial gain or other benefit to one's self or some aid or profit to another.

In considering this element, remember that it is the defendant's intent, at least in part, to be influenced or rewarded, which is important, not his or the Virgin Islands Government's or his agency's subsequent actions.

Thus, the prosecution does not have to prove that the defendant received the bribe or that the bribe actually influenced the Government of the Virgin Islands, or any agency thereof.

It is not even necessary that the defendant had the authority to perform the act sought.

Also, if you find that the defendant accepted the payment with the intent to be rewarded for a decision already made, it does not matter that the payment was not accepted or solicited until after the transaction occurred.

(Biggs J.A. 2991-92.) As the District Court thoroughly explained the *mens rea* required for a "corrupt

intent," the Court did not commit plain error in its charge to the jury.

Biggs challenges the personal money judgment of $960,482 entered against him on the following grounds: (1) lack of notice in the Indictment; (2) the District Court's failure to limit the personal money judgment to the maximum amount of restitution; and (3) the District Court's failure to consider Biggs's ability to pay.[2] As these issues present questions of law, we exercise plenary review. *United States v. Vampire Nation,* 451 F.3d 189, 198 (3d Cir. 2006) (citing *United States v. Ledesma-Cuesta,* 347 F.3d 527, 530 (3d Cir. 2003)).

With respect to notice, the Indictment contained forfeiture allegations, which explained that once convicted, Biggs would be required to forfeit any property constituting or derived from proceeds traceable to the offense or an equivalent sum of money. The Indictment further disclosed that the government would seek forfeiture of substitute assets to recover the illicit proceeds. Under Federal Rules of Criminal Procedure 7(c)(2) and 32.2(a), this was sufficient notice that Biggs could be subject to forfeiture and a personal money judgment.

---

[2] Biggs also contends that the District Court erred in failing to make him and his co-defendants jointly and severally liable. As the judgment expressly states to the contrary, this argument is without merit.

Biggs asserts without authority that the amount of the personal money judgment entered against him should not have exceeded the maximum amount of restitution Biggs could have been ordered to pay based upon his count of conviction, i.e., the $162,250 payment issued under a coastal zone management contract. In effect, Biggs contends that the District Court erred in including within the calculation the illicit proceeds related to the counts on which he was acquitted. Biggs erroneously conflates forfeiture and restitution, which "are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity. Given their distinct nature and goals, restitution is calculated based on the victim's loss, while forfeiture is based on the offender's gain." *United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008) (internal citations omitted). Moreover, "[e]ven counts on which the jury acquits may be considered in sentencing, if the judge finds by a preponderance of the evidence that the criminal activities occurred." *United States v. Genova*, 333 F.3d 750, 762 (7th Cir. 2003) (citation omitted). "So long as the sentencing court finds by a preponderance of the evidence that the criminal conduct through which the proceeds were made was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment." *United States v. Fruchter*, 411 F.3d 377, 384 (2d Cir. 2005) (citation omitted). The District Court found by a preponderance of the evidence that the bribery and kickback

scheme in which Biggs participated netted $960,482. Accordingly, the District Court was permitted to issue a personal money judgment in that amount for which Biggs and his co-defendants were jointly and severally liable.

Biggs's final challenge to the personal money judgment is directly contradicted by our precedent. In *Vampire Nation,* we held that "*in personam* forfeiture judgments are appropriate under 21 U.S.C. § 853, even where the amount of the judgment exceeds the defendant's available assets at the time of conviction." 451 F.3d at 203. Thus, this argument is unavailing.

Biggs challenges the following aspects of the District Court's Guidelines calculations: (1) the sixteen-level increase based on the net value of the benefit received from the scheme, pursuant to U.S.S.G. §§ 2C1.1(b)(2) and 2B1.1(b)(1)(I); and (2) the three-level increase based on Biggs's managerial or supervisory role, pursuant to U.S.S.G. § 3B1.1(b).[3] We review the sentence imposed by a district court for abuse of discretion. *United States v. Tomko,* 562 F.3d 558, 567 (3d Cir. 2009) (*en banc*). "[F]acts that are considered at sentencing, as a general matter, must

---

[3] Biggs further contends that the District Court departed upward from the advisory Guidelines range without prior notice. Contrary to this assertion, the District Court calculated a higher total offense level than that in the Presentence Report ("PSR") – 31 instead of 28 – and varied downward from the advisory range of 108 to 135 months to sentence Biggs to 84 months' incarceration. Accordingly, this contention is without merit.

be proved by a preponderance of the evidence." *United States v. Berry,* 553 F.3d 273, 280 (3d Cir. 2009) (citation omitted). The two challenged increases in the offense level were based upon facts found by the District Court by a preponderance of the evidence. These factual findings were not clearly erroneous, and the increases did not constitute an abuse of discretion.

## III.

For the foregoing reasons, we affirm the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 08-3531

---

UNITED STATES OF AMERICA

v.

DEAN C. PLASKETT,

Appellant

---

No. 08-3532

---

UNITED STATES OF AMERICA

v.

MARC A. BIGGS,

Appellant.

---

On Appeal from the United States District Court
for the District of the Virgin Islands
(D.C. No. 2007-cr-60)
District Judge: Honorable Curtis V. Gomez

---

Submitted Under Third Circuit L.A.R. 34.1(a),
December 2, 2009

Before: McKEE, FUENTES,
and NYGAARD, *Circuit Judges.*

---

JUDGMENT

---

This cause came on to be heard on the record from the United States District Court for the District of the Virgin Islands and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on December 2, 2009. On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the Judgments of the District Court be and the same are hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Each party shall bear its own costs.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: December 9, 2009

---

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

UNITED STATES OF AMERICA

**V.**

**PLASKETT, DEAN**

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 3:07CR00060-G-001

USM Number: 08010-094

Gordon C. Rhea, Esquire
Defendant's Attorney

**THE DEFENDANT:**

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) III, IX and X after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 666(a)(1)(B) | Bribery Concerning Programs/Receiving Federal Funds | 11/2002 thru 10/3/2003 | III |
| 18 U.S.C. § 1512(c)(2) | Obstruction of Justice | 12/2004 thru 01/2005 | IX |
| 18 U.S.C. § 1512(c)(2) | Obstruction of Justice | 12/2004 thru 01/2005 | X |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 14, 2008
Date of Imposition of Judgment

/s/ [Illegible]
Signature of Judge

Curtis v. Gómez, Chief Judge
Name and Title of District Judge

DECEMBER 9, 2008
Date

cc: AUSA, Armando O. Bonilla; Gordon C. Rhea, Esq.; Immigration Ofc.; U.S. Probation Ofc.; U.S. Marshal's Ofc.; Cynthia Romney; V.I. Police-Records – DOB (02/24/1965); Order Book
w:\FORMS\J&C Forms\revised j&c Dean Plaskett

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

**One hundred eight (108) months on Counts III, IX and X to be served concurrently.**

That pursuant to Public Law 108-405, revised DNA Collection requirements under the Justice for All Act of 2004, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the U.S. Probation Office.

**X** The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed in a prison camp facility or a minimum security facility.

☐ The defendant is remanded to the custody of the United States Marshal.

**X** The defendant shall surrender to the United States Marshal for this district:

at 9:00 **X** a.m. ☐ p.m. on August 21, 2008.

☐as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐before 2 p.m. on _____.

☐as notified by the United States Marshal.

☐as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____ _____
DEPUTY
UNITED STATES MARSHAL

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

**Three (3) years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

**X** The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

**X** The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use; distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | Assessment | Fine | Money Judgment |
|---|---|---|---|
| **TOTALS** | $ 300.00 | $ 0.00 | $ 1,086,237.34 |

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

**X** The defendant must make money judgment to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| ame of Payee | Total Loss* | Money Judgment | Priority or Percentage |
|---|---|---|---|
| .S. Marshal Service | Hazardous Material Trg. Seminar | $87,980.00 | 56% |
| /o Clerk of the Court | Coastal Zone Mgt. Contract | 318,010.00 | |
| istrict Court of the V.I. | EPA Incinerator Contract | 110,000.00 | |
| 500 Veteran's Dr., Suite 310 | Energy Survey Contract | 89,492.00 | |
| t. Thomas, V. I. 00802 | | *TOTAL: $605,482.00 | |
| irgin Islands Government | Title V Air Permit Contract | $300,000.00 | 32% |
| /o Claudette Watson-Anderson | Wildland Fire Safety/Work | | |
| epartment of Finance | Contract | 55,000.00 | |
| 314 Kronprindsens Gade | | | |
| t. Thomas, V. I. 00802 | | *TOTAL: $355,000.00 | |
| orporation "H" | Building Permit Review | *TOTAL: $125,755.34 | 12% |
| OVENSA | Contract | | |
| /o Alex A. Moorhead | | | |
| ice President of Govt. Affairs | | | |
| omm. Relations & Sec. | | | |
| Est. Hope, C'Sted., V.I. | | | |
| **OTALS** | $ 0 | $ 1,086,237.34 | |

Money Judgment amount ordered: $1,086,237.34

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

**A** ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

**B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or, ☐ F below); or

**C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of _____ over a period of _____ (e.g., months or years), to

commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

**D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ ____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

**E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F** **X** Special instructions regarding the payment of criminal monetary penalties:

**$300.00 Special Assessment is due immediately.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total

Amount, Joint and Several Amount, and corresponding payee, if appropriate.

**The personal money judgment shall be offset by restitution payments made by Hollis Griffin, Esmond Modeste, Earl Brewley, Brent Blyden, Marc Biggs, and any other convicted co-conspirator.**

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**FOR PUBLICATION**

**IN THE DISTRICT COURT**
**OF THE VIRGIN ISLANDS**
**DIVISION OF ST. THOMAS AND ST. JOHN**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | |
| DEAN C. PLASKETT, MARC A. BIGGS, and LEROY L. MARCHENA, | ) | Criminal No. 2007-60 |
| Defendants. | ) | |

ATTORNEYS:

**Armando Bonilla, Esq.**
Washington, D.C.
*For the government,*

**Gordon C. Rhea, Esq.**
Mount Pleasant, SC
*For defendant Dean C. Plaskett,*

**Treston E. Moore, Esq.**
St. Thomas, U.S.V.I.
*For defendant Marc A. Biggs,*

**Adriane J. Dudley, Esq.**
St. Thomas, U.S.V.I.
*For defendant Leroy L. Marchena.*

## ORDER

(Filed Aug. 13, 2008)

**GÓMEZ, C.J.**

Before the Court are the motions of Dean C. Plaskett ("Plaskett") and Marc A. Biggs ("Biggs") (collectively, the "Defendants") for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29 ("Rule 29"). Additionally, Plaskett moves for a new trial pursuant to Federal Rule of Criminal Procedure 33 ("Rule 33"). For the reasons stated in the accompanying Memorandum Opinion of even date, it is hereby

**ORDERED** that the motions for judgments of acquittal of Plaskett and Biggs are **DENIED**; and it is further

**ORDERED** that Plaskett's motion for a new trial is **DENIED**.

S\ _____

Curtis V. Gómez
Chief Judge

**FOR PUBLICATION**

**IN THE DISTRICT COURT**
**OF THE VIRGIN ISLANDS**
**DIVISION OF ST. THOMAS AND ST. JOHN**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| Plaintiff, | ) | |
| v. | ) | |
| **DEAN C. PLASKETT, MARC A. BIGGS, and LEROY L. MARCHENA,** | ) | Criminal No. 2007-60 |
| Defendants. | ) | |

ATTORNEYS:

**Armando Bonilla, Esq.**
Washington, D.C.
*For the government,*

**Gordon C. Rhea, Esq.**
Mount Pleasant, SC
*For defendant Dean C. Plaskett,*

**Treston E. Moore, Esq.**
St. Thomas, U.S.V.I.
*For defendant Marc. A. Biggs,*

**Adriane J. Dudley, Esq.**
St. Thomas, U.S.V.I.
*For defendant Leroy L. Marchena.*

## MEMORANDUM OPINION

(Filed Aug. 13, 2008)

**GÓMEZ, C.J.**

Before the Court are the motions of Dean C. Plaskett ("Plaskett") and Marc A. Biggs ("Biggs") (collectively, the "Defendants") for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29 ("Rule 29"). Additionally, Plaskett moves for a new trial pursuant to Federal Rule of Criminal Procedure 33 ("Rule 33"). For the reasons stated below, the Court will deny the motions for judgments of acquittal and for a new trial.

## I. FACTS

Plaskett was the Commissioner of the Virgin Islands Department of Planning and Natural Resources. Biggs was the Commissioner of the Virgin Islands Department of Property and Procurement.

On November 8, 2007, a grand jury returned a twelve-count indictment against Plaskett and Biggs, alleging that they participated in a scheme involving the issuance of government contracts in exchange for financial kickbacks. Count One charges Plaskett and Biggs with conspiracy to commit theft or bribery concerning programs receiving federal funds and honest services mail fraud. Counts Two through Four charge Plaskett with theft or bribery concerning programs receiving federal funds. Counts Five through Seven charge Biggs with theft or bribery

concerning programs receiving federal funds. Count Eight charges Plaskett with conspiracy to obstruct justice. Counts Nine and Ten charge Plaskett with obstruction of justice. Count Eleven charges Plaskett with making a false statement. Count Twelve charges Plaskett and Biggs with making fraudulent claims upon the government, under Virgin Islands law.

The trial in this matter commenced on February 11, 2008. The parties rested and the matter went to the jury during the third week of trial. During the second day of deliberations, the jury returned a verdict of guilty against Plaskett on Counts Three, Nine, and Ten. Plaskett was acquitted of the other offenses charged against him. Additionally, the jury found Biggs guilty as to Count Six. Biggs was acquitted of the remainder of the charges asserted against him.

The Defendants timely filed post-verdict motions for judgments of acquittal and for a new trial.

## II. DISCUSSION

### A. Rule 29

A judgment of acquittal is appropriate under Rule 29 if, after reviewing the record in a light most favorable to the prosecution, the Court determines that no rational jury could find proof of guilt beyond a reasonable doubt and the verdict is supported by substantial evidence. *United States v. Bobb,* 471 F.3d 491, 494 (3d Cir. 2006). The government may sustain

this burden entirely through circumstantial evidence. *Id.; see also United States v. Wexler,* 838 F.2d 88, 90 (3d Cir. 1988). "It is not [the Court's] role to weigh the evidence or to determine the credibility of the witnesses." *United States v. Cothran,* 286 F.3d 173, 175 (3d Cir. 2002).

**B. Rule 33**

When deciding a Rule 33 motion for a new trial, the Court is provided somewhat more discretion than what is afforded under Rule 29. Under Rule 33, the Court may grant a new trial "in the interest of justice." *United States v. Charles,* 949 F. Supp. 365, 368, 35 V.I. 306 (D.V.I.1996). In assessing such "interest," the court may weigh the evidence and credibility of witnesses. *United States v. Bevans,* 728 F. Supp. 340, 343 (E.D. Pa. 1990), *aff'd,* 914 F.2d 244 (3d Cir. 1990). If the Court determines that there has been a miscarriage of justice, the court may order a new trial. *Id.* The burden is on the defendant to show that a new trial ought to be granted. *United States v. Clovis,* Crim. No. 94-11, 1996 U.S. Dist. LEXIS 20808, at *5 (D.V.I. Feb. 12, 1996).

## III. ANALYSIS

### A. Sufficiency of the Evidence

#### 1. Count Six: Theft or Bribery Concerning Programs Receiving Federal Funds

Biggs contends that acquittal is appropriate as to his conviction on count Six because the government presented insufficient evidence at trial to prove that he committed theft or bribery concerning programs receiving federal funds under 18 U.S.C. § 666(a)(1)(B) ("Section 666(a)(1)(B)").

To support a conviction for theft or bribery concerning programs receiving federal funds the government must prove that: (1) at the time of the conduct in question the defendant was an agent of a government or an agency thereof; (2) that the government or agency received federal benefits in excess of $10,000 during a one-year period; (3) the defendant accepted or agreed to accept or solicited or demanded something of value from another person; (4) the defendant acted corruptly with the intent to be influenced or rewarded in connection with a transaction of the government or agency; and (5) that the value of such transaction exceeded $5,000. *See* 18 U.S.C. § 666(a)(1)(B); *see also United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991) (listing the elements of the offense).

"As used in criminal-law statutes, [the term] *corruptly* usu[ally] indicates a wrongful desire for pecuniary gain or other advantage." Black's Law Dictionary (8th ed. 2004). As the United States Court of Appeals for the Second Circuit has explained, "[t]he

plain language of [Section 666(a)(1)(B)] makes clear that a recipient's knowledge of a donor's intent to influence is insufficient to support conviction. The recipient must take the proffered thing of value 'intending to be influenced.'" *United States v. Ford*, 435 F.3d 204, 214 n.5 (2d Cir. 2006); *see also United States v. Rooney*, 37 F.3d 847 (2d Cir. 1994) (holding that the term "corruptly," as used in Section 666(a)(1)(B), entails violation of some duty owed to government or to public in general).

Here, Count Six specifically charged that "in or about mid-January, 2003," Biggs "corruptly solicited, accepted, and agreed to accept cash payments from Hollis L. Griffin [Director of DPNR from 1999, until 2004], intending to be influenced and rewarded in connection with his official acts in connection with the Coastal Zone Management Contracts." (Indictment 27, ¶ 30, Nov. 8, 2007.) At trial, the government presented evidence that: Biggs was an agent of the Virgin Islands government during mid-January, 2003; the Virgin Islands government received federal benefits in excess of $10,000 within a one-year period; and that Biggs accepted or agreed to accept cash from Hollis L. Griffin ("Griffin") during mid-January, 2003.

Additionally, Griffin testified at trial that he frequently met with Biggs to discuss how they could make profits through the issuance of local government contracts. Griffin stated that

> [a]t one point . . . Dean Plaskett brought Marc Biggs into my office at the Water Gut

> Homes, and they came to me and they told me that, you know, Environmental Protection has got a lot –
>
> . . .
>
> That Environmental Protection has got a lot of money, and that we should try to find companies that we could give contracts to, and that these people would give us some money from these contracts, kick us back some money.

(Trial Tr. 160, Feb. 12, 2008.) During a subsequent meeting, Plaskett, Biggs, and Griffin identified a contract to perform various work for the Division of Coastal Zone Management ("CZM") as a potential money maker. Finally, the government presented evidence that the value of the CZM Contract was over $5,000.

Making every reasonable inference in favor of the government, a rational jury could find beyond a reasonable doubt that Biggs corruptly accepted cash payments with the intent to be influenced in connection with a government transaction worth over $5,000. *See, e.g., United States v. Flemming*, 223 Fed. Appx. 117, 122-23 (3d Cir. 2007) (holding that the evidence was sufficient to support the defendant's conviction for program fraud because a rational jury could find beyond a reasonable doubt that the defendant corruptly gave a housing authority employee money to influence the employee to expedite payments to the defendant's private company under a government contract) (unpublished).

### 2. Counts Nine and Ten: Obstruction of Justice

Plaskett argues that he is entitled to a judgment of acquittal on Counts Nine and Ten because the government presented insufficient evidence at trial to sustain a conviction against him for obstruction of justice under 18 U.S.C. § 1512(c)(2) ("Section 1512(c)(2)"). He contends that the government failed to establish a sufficient nexus between the obstructive conduct charged in those counts and an official proceeding.

Section 1512(c)(2) provides:

> Whoever corruptly –
>
> . . .
>
> . . . obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(c) (2002).

To sustain a conviction for obstruction of justice under Section 1512(c)(2), the government must prove: (1) that the defendant knowingly; (2) corruptly obstructed, influenced and impeded, or attempted to do so; (3) an official proceeding. *See id.*; *see also United States v. Reich,* 479 F.3d 179, 185-87 (2d Cir. 2007); *United States v. Peel,* 2006 WL 2864106 at *2 (S.D. Ill. Oct. 2, 2006); *United States v. Guardiola Ramirez,* 2006 WL 573917 at *2 (D. Puerto Rico March 8, 2006).

For purposes of Section 1512, the term "official proceeding" includes: "a proceeding before . . . a Federal grand jury," and "a proceeding before a Federal Government agency which is authorized by law. . . ." 18 U.S.C. § 1515(a)(1)(A), (C). While the "official proceeding need not be pending or about to be instituted at the time of the offense," 18 U.S.C. § 1512(f)(1), such proceeding must have been foreseen by the defendant. *See Arthur Andersen LLP v. United States,* 544 U.S. 696, 707, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) ("It is . . . one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen.").

To prove the requisite intent to obstruct, courts have required the government to show that there was a sufficient nexus between the obstructive conduct and the official proceeding. *See Arthur Andersen LLP,* 544 U.S. at 708 (holding that 18 U.S.C. § 1512(b) contains a nexus requirement); *United States v. Aguilar,* 515 U.S. 593, 600, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) (holding that the government must satisfy the nexus requirement to sustain a conviction for a violation of 18 U.S.C. § 1503,[1] whose relevant language is similar to Section 1512(c)(2)); *see also United States*

---

[1] Title 18 U.S.C. § 1503 subjects to criminal liability one who corruptly "endeavors to influence, intimidate, or impede" an officer or juror or "influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503(a)

*v. Reich*, 479 F.3d 179, 186 (2007) (construing Section 1512(c)(2) as containing a nexus requirement). To satisfy the nexus requirement, a defendant's conduct must have "the natural and probable effect of interfering with a judicial or grand jury proceeding that constitutes the administration of justice; that is, the act must have a relationship in time, causation, or logic with the judicial proceedings." *United States v. Vampire Nation*, 451 F.3d 189, 204-06 (3d Cir. 2006) (quoting *United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006)). "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding . . . he lacks the requisite intent to obstruct." *Arthur Andersen LLP*, 544 U.S. at 708.

Plaskett was convicted on Counts Nine and Ten for aiding and abetting Leroy Marchena in obstructing an official proceeding in late December, 2004, and mid-January, 2005. The government presented evidence at trial that in December, 2004, Plaskett and Marchena met with alleged coconspirator Brent E. Blyden ("Blyden") at Marchena's office. During the meeting, the men discussed the investigation of a Virgin Islands government contract that was part of the alleged bribery scheme.

> A: [Marchena] said . . . and there's a problem in terms of there's an investigation; and also, you know, the forgery of documents, that articles of incorporation, and the business license. And we need to find out, you know, how we can resolve this.

(Trial Tr. 207 Feb. 15, 2008.) Blyden further testified that during the December, 2004, meeting, Plaskett instructed Blyden to travel to Atlanta, Georgia to meet with an individual named Barry Bennett ("Bennett") to discuss backdating documents to appear as if they were created in connection with a contract previously awarded to a company called Elite for a project.

Blyden returned from Atlanta on December 31, 2004, and met with Plaskett in early January to discuss the results of the trip. Blyden testified that, during the time period around December, 2004, and January, 2005, he and Plaskett "would often meet and talk about the potential of [the investigation] going up to the Federal Government, and it's really getting to be, you know, nasty. . . ." (*Id.* at 225.)

Bennett also testified that, in January, 2005, he traveled from Atlanta to St. Thomas, where he met with Plaskett and Marchena at Marchena's home. During that meeting, Plaskett asked Bennett whether he could recreate and back-date certain documents related to a contract connected with the bribery scheme.

The evidence further established that, in early February, 2005, federal agents interviewed Plaskett in connection with an investigation of the alleged bribery and kick-back scheme. Additionally, a federal grand jury proceeding was conducted on the matter in mid-March, 2005.

A rational jury believing the government's evidence could find that Plaskett met with Blyden and Bennett in order to cover up the alleged bribery and kickback scheme. Viewed in the light most favorable to the government, the evidence also shows that Plaskett knew at the time of those meetings that a federal investigation and grand jury proceeding were likely forthcoming. A rational jury could find beyond a reasonable doubt that Plaskett knowingly attempted to corruptly impede or obstruct an official proceeding in December, 2004, and in January, 2005. Accordingly, the evidence adduced at trial was sufficient to sustain Plaskett's convictions on Counts Nine and Ten of the indictment.[2] *See, e.g., United States v. Mintmire,* 507 F.3d 1273, 1289 (11th Cir. 2007) (holding that evidence which allowed the jury to conclude that the defendant corruptly attempted to withhold information from, or put misinformation before, the grand jury was sufficient to sustain a conviction under Section 1512(c)); *United States v. Lucas,* 499 F.3d 769 (8th Cir. 2007) (holding that evidence that the defendant asked two people to claim ownership of

---

[2] To the extent Plaskett argues that the federal agency investigation does not constitute an official proceeding under Section 1512(c)(2), the Court is unpersuaded. Indeed, the plain language of the statute forecloses Plaskett's interpretation. *See, e.g., United States v. Kelley,* 36 F.3d 1118, 1128 (D.C. Cir. 1994) ("[T]he grand jury proceeding and the Inspector General's investigation constituted 'official proceedings' within the meaning of [Section] 1512."); *United States v. Gonzales,* 922 F.2d 1044, 1055-56 (2d Cir. 1991) (holding that a Drug Enforcement Agency investigation was an "official proceeding").

firearm found in the apartment where he was arrested, and that each of them understood the request to be in earnest, was sufficient to support conviction for attempted obstruction of justice under Section 1512(c)).

### B. New Trial

Plaskett asserts that the interests of justice favor granting him a new trial for four separate reasons.

#### 1. Disclosure of Impeachment or Exculpatory Material

First, Plaskett claims that the government violated his due process rights by withholding information regarding Griffin's enrollment in drug treatment programs during two different periods. He asserts that the drug treatment information was finally disclosed in a letter dated February 1, 2008. Plaskett further complains that the government failed to provide the medical records associated with Griffin's drug treatment sessions.

In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court of the United States held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." *Id.* at 87 (quotation omitted). In *Giglio v. United States*,

405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court extended *Brady's* disclosure requirement to include evidence that may be used to impeach the credibility of a government witness. *See id.* at 154.

*Brady* material must be presented to a defendant prior to trial. *See A.H. v. Gov't of the V.I.*, 48 V.I. 394, 400 (D.V.I. App. Div. 2006). While there is no specific time for disclosing Brady material, "[n]o denial of due process occurs if Brady material is disclosed in time for its effective use at trial." *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984). Additionally, Brady does not compel the government "to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *Id.*

Assuming that Plaskett was entitled under *Brady* and *Giglio* to receive information regarding Griffin's drug treatment programs, he had ample time to review the February 1, 2008, letter before trial. Further, Griffin testified that he had told Plaskett about his drug addiction prior to the trial. Because the February 1, 2008, letter was disclosed in time for its effective use at trial, and because the gist of the information contained therein was available to the defense before that time, the disclosure of this document did not constitute a *Brady* violation. *See, e.g., United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983) ("The *Brady* material in this case was information that appellees could use on cross-examination to challenge the credibility of government witnesses.

For that type of material, we think appellees' right to a fair trial will be fully protected if disclosure is made the day that the witness testifies."); A.H., 48 V.I. at 400 (refusing to find a *Brady* violation "[s]o long as the information is provided to [the defendant] before the trial. . . ."); *Felix v. Gov't of the V.I.*, 47 V.I. 573, 583 (D.V.I. App. Div. 2005) (concluding that the defendant was not entitled to a new trial based on an alleged *Brady* violation).

Plaskett also argues that the government's failure to provide the medical records associated with Griffin's drug treatment constituted a *Brady* violation. However, the Court has already found that no *Brady* violation occurred with respect to the disclosure of information about Griffin's drug treatment. The Court is unpersuaded that the details of Griffin's drug treatment were relevant or material to Plaskett's defense. Indeed, the Court finds that level of detail to be immaterial. Beyond being immaterial, it could lead to the presentation of evidence that wastes time, which would only be relevant if this were a mini trial on the issue of Griffin's drug treatment. Most assuredly, that was not the issue on trial. As such, the government's failure to produce Griffin's medical records was not a *Brady* violation.[3]

---

[3] The Court also notes that Plaskett was allowed broad leeway during trial in his cross-examination of Griffin on the issue of his time in the drug treatment programs.

### 2. Exclusion of Recorded Conversations

Second, Plaskett contends that a new trial is required because of the exclusion of two recorded telephone conversations between Plaskett and Griffin. Plaskett attempted to introduce the entirety of these calls on February 13, 2008, and again on February 21, 2008. The Court, however, held that only portions of the recordings were admissible. Plaskett chose not to present edited versions of the calls.

Plaskett's Rule 33 motion restates the arguments he made at trial in support of the admission of the two conversations. After weighing the probative value of the calls in question against the risk of unfair prejudice, confusion, delay, and judicial economy,[4] the Court declined to admit the portions of the recordings. For the reasons more fully stated on the record at the trial in this matter, the Court now reaffirms these findings.

### 3. Bill of Particulars

The third basis offered by Plaskett in support of his motion for a new trial relates to the January 30, 2008, order entered by the United States Magistrate

---

[4] *See* Fed. R. Ev. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Judge denying Plaskett's pretrial motion for a bill of particulars.

When a Magistrate Judge resolves a non-dispositive pretrial matter such as a motion for a bill of particulars, "[a] party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to." Fed. R. Civ. P. 72(a). Here, Plaskett failed to timely object to the Magistrate Judge's order denying the motion for a bill of particulars. Accordingly, Plaskett is precluded from raising that issue for the first time in the instant motion. *See id.*

Moreover, even assuming that Plaskett's challenge to the January 30, 2008, order had been timely, it would not entitle him to a new trial.

"A bill of particulars is a 'formal, detailed statement of the claims or charges brought by a plaintiff or a prosecutor[.]'" *United States v. Urban*, 404 F.3d 754, 771 (3d Cir. 2005) (quoting Black's Law Dictionary 177 (8th ed. 2004)) (alteration in original). "The purpose of a bill of particulars is to inform the defendant of the nature of the charges brought against him, to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *Id.* (quotation omitted). To show entitlement to a bill of particulars, a defendant must establish actual surprise at trial and demonstrate prejudice to his substantial rights. *See id.* at 772 ("Only where an

indictment significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial[,] will we find that a bill of particulars should have been issued." (internal citations and quotations omitted)).

The indictment in this matter contained forty pages of detailed allegations involving Plaskett, including the approximate location, month, and year of the conduct at the heart of each count. The charges in the indictment were more than sufficient to apprise Plaskett of the nature of the offense he was required to defend. Furthermore, Plaskett has failed to demonstrate actual surprise at trial or prejudice to his substantial rights as a result of the denial of his request for a bill of particulars. *See, e.g., Urban,* 404 F.3d at 772 (holding that a bill of particulars was inappropriate because, *inter alia,* the indictment provided more than enough information to allow Appellants to prepare an effective trial strategy); *United States v. Armocida,* 515 F.2d 49, 54 (3d Cir. 1975) (holding that the defendant was not entitled to a bill of particulars where, *inter alia,* the defendant failed to "specif[y] any prejudice to his case or show[ ] what he would have done differently had he" obtained the bill of particulars).

**4. Bennett's Testimony**

Finally, Plaskett argues that he is entitled to a new trial based on the admission of certain statements made by Bennett in the presence of the jury.

Bennett testified at trial regarding an occasion when he met with Marchena, to discuss contracts related to the alleged bribery and kick-back scheme. During that conversation, Bennett stated:

> Mr. Marchena said, "The boys are in trouble." I inquired, "What does that mean?" He said, he said, "Commissioner Dean Plaskett. He should not have hired that Hollis, because Hollis is a loose cannon. He's a junky and he's dangerous."
>
> [PROSECUTOR]: What else, if anything, did Mr. Marchena say about Mr. Hollis at that meeting?
>
> A: He said, "He's dangerous, and they need to get rid of him." Then he turned to me and asked, Do I know anyone who could get rid of Hollis.

(Trial Tr. 303-04, Feb. 14, 2008.) The Court initially sustained the Defendants' objections to the above testimony on grounds that its probative value to the corruption charges in this case was outweighed by the undue prejudice to Plaskett caused by the admission of such testimony regarding a possible plot to kill Griffin. The Court also immediately instructed the jury to disregard Bennett's last statement in its entirety. However, the Court reversed its ruling the following day, reasoning that, though Bennett's testimony likely caused some prejudice, it was not unfairly prejudicial. At that time, the Court gave the following instruction to the jury:

> Before we resume with that examination, there was a ruling that the Court made yesterday, where the Court had instructed you to disregard a statement that Mr. Bennett had made. I think it was the last piece of evidence that came in before we adjourned for the day.
>
> The Court has reversed its ruling, and you may consider that information, but with this very important limiting instruction.
>
> You may only consider that information with respect to charges in the indictment as against Mr. Marchena. That is, the last statement that Mr. Bennett made that he attributed to Mr. Marchena may only be considered with respect to Mr. Marchena for the charges in the indictment.
>
> There is no charge in the indictment for any homicide, any attempted homicide, and you may not, in fact you are prohibited from having that enter any consideration, because there's no such charge in the indictment.
>
> You may only consider it for the charge in the indictment with respect to Mr. Marchena. You may not consider that statement with respect to any other defendant who is before you.

(Trial Tr. 21-22, February 15, 2008.)

Again, Plaskett's arguments regarding the admission of Bennett's testimony parrots those he made during trial. For the same reasons enunciated at

trial, the Court reaffirms its finding that the testimony in question was admissible.

In sum, none of the grounds asserted by Plaskett show that the interests of justice require granting him a new trial.

## IV. CONCLUSION

Base on the foregoing, the Court will deny the motions of Plaskett and Biggs for judgments of acquittal. The Court will also deny Plaskett's motion for a new trial.[5] An appropriate Order follows.

S\ _____
Curtis V. Gómez
Chief Judge

---

[5] Biggs has filed a motion requesting "that the Court grant a conditional new trial in the event any post-verdict judgment of acquittal on Count VI of this action is reversed." (Biggs' Mot. for a New Trial 3, May 28, 2008.) Because the Court has declined to enter a post-verdict judgment of acquittal on Count VI, Biggs' motion will be denied as moot.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 08-3531

---

UNITED STATES OF AMERICA

v.

DEAN C. PLASKETT,

Appellant,

---

**SUR PETITION FOR REHEARING EN BANC**

---

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and *NYGAARD, *Circuit Judges*

---

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

---

* Judge Nygaard's vote is limited to panel rehearing only.

regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: February 3, 2010

tmk/cc: Armando O. Bonilla, Esq.
Michael Ferrara, Esq.
Peter M. Koski, Esq.
Gordon C. Rhea, Esq.